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No. 95-1081

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In The

Supreme Court of the United States

October Term, 1995

INGALLS SHIPBUILDING, INC. AND AMERICAN
MUTUAL LIABILITY INSURANCE COMPANY, IN
LIQUIDATION, BY AND THROUGH THE MISSISSIPPI
INSURANCE GUARANTY ASSOCIATION,

Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, U.S. DEPARTMENT OF LABOR, AND
MAGGIE YATES (Widow of Jefferson Yates),

Respondents.

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit*

BRIEF IN OPPOSITION FOR RESPONDENT MAGGIE YATES

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QUESTIONS PRESENTED

1. Is the wife (a "potential" widow) of an injured worker a "person entitled to compensation" under § 33(g) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") when she enters into third party tort settlements during the lifetime of her husband?

2. Does the Director of the Office of Workers' Compensation Programs have standing to respond to a Petition For Review of a Benefits Review Board decision pursuant to Fed. R. App. P. 15(a)?

3. Does § 33(f) of the LHWCA permit the Employer and Carrier to offset their liability for death benefits to a widow with third party tort recoveries of her adult, non-dependent children who did not file LHWCA death claims, had no legal standing to invoke the LHWCA, and are not "persons entitled to compensation"?

4. Do the release documents executed by the Claimant-widow and her adult, non-dependent six children in connection with post-death settlements clearly and unambiguously require the widow, Mrs. Yates, to give the Employer and Carrier a credit for the sums received by her adult, non-dependent six children?

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STATEMENT OF THE CASE

For ease of reference, the Petitioners will be referred to as "Ingalls" or the "Employer". The Claimant-Respondent will be referred to as "Maggie Yates", "Mrs. Yates", or the "Respondent". The Respondent, Director of the Office of Workers' Compensation Programs, will be referred to as the "Director". The Administrative Law Judge and the Benefits Review Board will be referred to as the "ALJ" and the "BRB" or the "Board", respectively. Pursuant to Sup. Ct. R. 24.1(g), references to the Petitioners' Appendix will be by the designation (Pet. App.), and references to the Respondent's Appendix will be by the designation (Resp. App.). References to other portions of the record will be by the designation (R.), and references to testimony before the ALJ will be by the designation (Tr.). Exhibits will be referred to as (JX) or (Emp. Exh.).

Jefferson and Maggie Yates married in 1931. For approximately thirty years, they lived in George County, Mississippi. (Tr. 22). Mr. Yates worked for Ingalls as a shipfitter beginning in 1953. He ended his employment with Ingalls in September, 1967. Mr. Yates worked in other jobs until he voluntarily retired in 1974 at the age of sixty-seven. (R. 246).

On March 23, 1981, Mr. Yates was evaluated for asbestos-related diseases. On April 16, 1981, Mr. Yates filed a claim for disability benefits against Ingalls under the LHWCA. (R. 246; Pet. App. 61). On May 26, 1981, he filed a third-party tort action in the United States District Court for the Southern District of Mississippi, Southern Division, seeking damages against the manufacturers and sellers of asbestos products to which he was exposed while employed at Ingalls. (R. 247; Tr. 30; Pet. App. 61). Mrs. Yates was not a plaintiff in the third-party action. (Pet. App. 61).

Mr. Yates was diagnosed with asbestosis on April 17, 1981. He died on January 28, 1986. His death was caused in part by his asbestos exposure. (Pet. App. 59). On April 22, 1986, Maggie Yates, Mr. Yates' widow, filed a claim for death benefits under § 9 of the LHWCA. 33 U.S.C. § 909; (Pet. App. 63). At the time of Mr. Yates' death, none of the Yates' six (6) children were minors or dependent on Mr. Yates. None of the children filed claims for death benefits under the LHWCA. (R. 246; Tr. 37; Pet. App. 60, 63).

Before his death, Mr. Yates agreed to settlements with approximately eight third-party defendants (the "pre-death settlements"). Mrs. Yates joined in the settlements, which were made without obtaining Ingalls' prior written approval. (R. 247; Pet. App. 62-63). Releases were signed which released the third-party defendants from liability arising from Mr. Yates's exposure to asbestos. Some of the earlier third-party settlements limited the Claimant's release to loss of consortium. (R. 248; Pet. App. 63). Other settlements used language to foreclose the Claimant from bringing any future tort claim for the wrongful death of Mr. Yates. (R. 248; Pet. App. 63). None of the pre-death settlements foreclosed Ingalls from bringing its own claim under *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S. Ct. 1144, 22 L. Ed. 2d 371 (1969). (R. 248; Pet. App. 63).

Mr. Yates' LHWCA claim for disability benefits under § 8 of the Act was filed before his death, and was settled pursuant to § 8(i) of the Act on May 5, 1983 for a lump sum payment of \$15,000, open medical benefits, and an award of attorney's fees. (R. 245, 247; Pet. App. 62). The medical benefits referenced in this settlement amounted to \$454.15. Therefore, Ingalls' total liability for compensation and medical benefits to Mr. Yates was \$15,454.15. Hence, Ingalls' lien in the third-party suit was \$15,454.15. Ingalls had notice of the pre-death settlements, and asserted its lien. Ingalls was paid its compensation lien of \$15,454.15 in full. (R. 253; Pet. App. 62-63).

After Mr. Yates' death, Maggie Yates and her six children entered into three additional settlements with third-party tort defendants (the "post-death settlements"). At the hearing before the ALJ, Ingalls stipulated that the six adult Yates' children were not dependent on Mr. Yates at the time of his injury and death. (JX-1; Tr. 37; Pet. App. 60). Hence, none of the adult, non-dependent Yates' children filed a claim for death benefits under § 9 of the LHWCA, and none of them were entitled to benefits under the LHWCA. Ingalls gave written approval for each of the post-death settlements under § 33(g). Ingalls did not intervene in the third-party suit, and was not a signatory to the release documents. Ingalls asserts that in the post-death settlements, "Mrs. Yates and her adult children agreed that Ingalls would be entitled to a credit or offset in the entire amount of all sums received from the third-party defendants". (Pet. Cert. 4). However, the settlement documents, reasonably read and construed, do not clearly and unambiguously reflect an intent that Mrs. Yates agreed to do so.

The three post-death settlements were consummated with Raymark Industries, Inc. ("Raymark"), Wellington, and the Manville Trust. The Raymark settlement provides in part that:

... if any such claim¹ shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to any releasor shall first be given credit for the consideration paid to releasors under this agreement, less reasonable costs of

1. A claim for workers' compensation benefits under the Mississippi Workers' Compensation Act or the LHWCA.

collection and shall make no payment of any compensation benefits to any releasor until the consideration paid to releasors under this agreement is exhausted.

(Resp. App. 3a-4a). Mrs. Yates signed an "acknowledgment" in connection with the Raymark settlement. The acknowledgment is part of an exhibit offered in evidence before the ALJ by Ingalls. (Resp. App. 7a; Emp. Exh. 21, p. 17). In the acknowledgment, Mrs. Yates stated her understanding that if she was successful in her claim for death benefits against Litton Systems, Inc.², Litton (Ingalls) would be "given credit for the amount of money paid to me by Raymark" and that Litton would owe Mrs. Yates no further compensation "until the amount received by me from the above mentioned defendant has been exhausted. . . ." *Id.* (emphasis added).

The Fifth Circuit found the language of the Raymark release almost identical to the language "included in the other two instruments". *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460, 466 (5th Cir. 1995); (Pet. App. 16). The Wellington release provides:

. . . If any such claim³ shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier . . . ordered to pay such compensation benefits shall first be given credit for the consideration paid to the

2. Ingalls was then known as Litton Systems, Inc.

3. Again, a claim for workers' compensation benefits under the state act or the LHWCA.

undersigned under this agreement, less reasonable costs of collection, and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted.

(Resp. App. 10a). The Wellington release provides that it will be governed and construed by Mississippi law. (Resp. App. 11a). An identical provision is found in the other releases, which state that Mississippi law governs. (Resp. App. 6a, 16a).

At the hearing before the ALJ, Mrs. Yates testified without contradiction that all settlements since Mr. Yates' death in 1986 had been split equally between her and the six children. (Tr. 26-28; Resp. App. 25a). Hence, as the ALJ found, Mrs. Yates recovered one-seventh (1/7) of each of the three post-death settlements. (R. 261-63; Pet. App. 83). The ALJ also found that under Mississippi's wrongful death statute, Miss. Code Ann. § 11-7-13 (1995 Supp.), damages for the wrongful death of a married man were required to be distributed equally to his wife and children. (R. 261; Pet. App. 83).

The ALJ found that Mrs. Yates' death claim was not barred by § 33(g) because she was not a "person entitled to compensation" at the time of the pre-death settlements. The ALJ also found that the employer was not entitled to offset its liability to Mrs. Yates for death benefits by the amounts recovered by the non-dependent adult children in the post-death settlements, as a matter of law. Instead, the ALJ held that the employer was contractually entitled to an offset and credit for the full third-party recovery, including that of the six adult, non-dependent children. (R. 244-64; Pet. App. 86).

Appeals were prosecuted to the BRB by Ingalls and Mrs. Yates. The BRB affirmed the ALJ's ruling on § 33(g), since Mrs. Yates was not a "person entitled to compensation" at the time of the pre-death settlements. The Board also affirmed the ALJ's decision that the Employer was not entitled, as a matter of law, to a credit against its liability for death benefits for amounts received by the non-dependent adult Yates children in the post-death settlements. A majority of the Board held that there was no contractual basis for allowing the offset of the full third party recoveries, and reversed the ALJ on this point. A majority of the Board also held that such a contract would be tantamount to a waiver of compensation which is barred by § 15(b) of the Act, 33 U.S.C. § 915. (Pet. App. 43-44).

Ingalls appealed the BRB's decision to the Fifth Circuit Court of Appeals. On October 3, 1995, the Fifth Circuit affirmed the BRB on all issues. (Pet. App. 1-17); *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 65 F.3d 460 (5th Cir. 1995). Ingalls' suggestion for rehearing *en banc* was denied on November 22, 1995. (Pet. App. 18-19).

REASONS FOR DENYING THE WRIT

I.

IS THE WIFE (A "POTENTIAL" WIDOW) OF AN INJURED WORKER A "PERSON ENTITLED TO COMPENSATION" UNDER § 33(g) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT ("LHWCA") WHEN SHE ENTERS INTO THIRD PARTY SETTLEMENTS DURING THE LIFETIME OF HER HUSBAND?

On the issue of forfeiture under § 33(g) of the LHWCA, there are two separate reasons which justify denying the Petition

for a Writ of Certiorari. First, the Fifth Circuit's decision was clearly correct. Second, the Petitioners' argument in support of the writ — a split of authority between two circuits — does not automatically provide the "compelling reasons" to justify issuance of the writ. Sup. Ct. R. 10. ("A Petition for a Writ of Certiorari will be granted only for compelling reasons".).

The § 33(g) issue should not be accepted for review by the Court because the BRB and the Fifth Circuit fully considered and correctly decided the issue, based on this Court's interpretation of the phrase "person entitled to compensation" in *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992). The Petitioners make several misstatements or omissions of fact or law in their argument which the Respondent has a duty to address. Sup. Ct. R. 15.2. First, the Petitioners argue that by settling her future claims for the wrongful death of her husband during her husband's lifetime, Mrs. Yates extinguished the potential subrogation claims of Ingalls against the third party asbestos manufacturers. (Pet. Cert. 9). None of the pre-death settlements foreclosed Ingalls from bringing its own claim for reimbursement under *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S. Ct. 1144, 22 L. Ed. 2d 371 (1969). (Pet. App. 63). As Ingalls has asserted in other litigation, it has "an independent *Burnside* action against any settling third party defendant who has not obtained Litton's consent to (such) settlement". *Lowe v. Ingalls Shipbuilding, A Div. Of Litton Systems, Inc.*, 723 F.2d 1173, 1181 (5th Cir. 1984).

Second, the Petitioners' argument that "a potential widow's claim vests at the time of her husband's injury, as opposed to the time of his death" is contrary to logic and the overwhelming weight of authority. (Pet. Cert. 14). The argument is advanced to persuade the Court that Mrs. Yates was a "person entitled to compensation" at the time of the pre-death settlements under § 33(g), and of course, to grant the writ. This argument did not

persuade the ALJ, the BRB, or the Fifth Circuit, and it should not persuade this Court that it is a solid legal foundation on which to grant a discretionary writ of certiorari.

As observed by the Board and the Fifth Circuit, a claim for death benefits arises only upon the death of an injured worker covered by the LHWCA to whom the claimant was married or on whom the claimant was dependent. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, *supra*, at 464; (Pet. App. 10, 32-35, 68-69). This principle is also found in *Travelers Ins. Co. v. Marshall*, 634 F.2d 843, 846 (5th Cir. 1981),⁴ a case cited by the Petitioners in their brief. (Pet. Cert. 13). This well-settled principle is followed by an impressive line of cases from various circuits. *I.N.A. v. Dept. of Labor*, 969 F.2d 1400, 1405-06 (2nd Cir. 1992) (right to death benefits a separate claim which did not accrue until death); *Shea v. Director, OWCP*, 929 F.2d 736, 739 (D.C. Cir. 1991); *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 779, 784-86 (5th Cir. 1988) (n. 3) (right to death benefits may not be settled before it arises, i.e., before the death of the injured worker); *Henry v. George Hyman Const. Co.*, 9 F.2d 65, 73-74 (D.C. Cir. 1984) (n. 31) ("when death occurs, a new cause of action arises"); *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979); *St. Louis Ship Building and Steel Co. v. Casteel*, 583 F.2d 876, 877 (8th Cir. 1978) ("liability for death benefits comes into existence only upon the event of death and is therefore independent of the liability for disability benefits occasioned by the earlier injury"); *Nacirema Operating Co. v. Lynn*, 577 F.2d 852, 853 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979) ("right to death benefits does not vest until the time of death"); *State Insurance Fund v. Pesce*, 548 F.2d 1112, 1114 (2nd Cir. 1977) ("right to death benefits separate and distinct from right to disability benefits, and does not come into being

4. "A cause of action for death benefits certainly does not arise until death".

until death"); *Norfolk, Baltimore and Carolina Lines, Inc. v. Director, OWCP*, 539 F.2d 378, 380 (4th Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977) (death claim does not exist during decedent's lifetime, and does not become vested until death); *Hampton Roads Stevedoring Corp. v. O'Hearne*, 184 F.2d 76, 79 (4th Cir. 1950); *International Mercantile Marine Co. v. Lowe*, 93 F.2d 663, 664 (2nd Cir. 1938), *cert. denied*, 304 U.S. 565 (1938).

In other words, a claim for disability benefits under § 8 of the LHWCA, such as the one advanced by Mr. Yates during his lifetime, and a claim for death benefits under § 9 of the Act, advanced by Mrs. Yates after her husband's death, are separate and distinct. The claims have different claimants, and they accrue on different bases. *Id.*; *Alabama Dry Dock and Shipbuilding Co. v. Director, OWCP*, 804 F.2d 1558, 1560-61 (11th Cir. 1986). The Petitioners argue that the Fifth Circuit overlooked "the fact that many aspects of a death claim vest at the time of the worker's injury", for example, determination of the responsible employer and questions of dependency. (Pet. Brief 13). Obviously, there is a connection between a deceased worker's original injury and a subsequent death claim by the worker's widow, because the 1984 Amendment to § 9 of the LHWCA provides a death benefit only if the employment injury causes the employee's death. *Shea v. Director, OWCP*, *supra*, at 737 (n. 1).

However, the issue is whether Mrs. Yates was a "person entitled to compensation" at the time of the pre-death settlements. In other words, did Maggie Yates qualify for a death benefit under the LHWCA at the time of the pre-death settlements? The ALJ, the Board, and the Fifth Circuit correctly answered, no, because Mrs. Yates's "right to death benefits under the Act could not have vested *before* she became a widow". (Pet. App. 35) (BRB's emphasis). As observed by the Fifth Circuit, there were three contingencies under which Mrs. Yates's right to

death benefits under the LHWCA would have never accrued. "She could have predeceased or divorced her husband, or Jefferson Yates could have died from causes unrelated to his employment". *Ingalls Shipbuilding, Inc. v. Director, OWCP*, *supra*, at 464; (Pet. App. 10-11, 35). Upon the happening of any of the three contingencies, Mrs. Yates' right to death benefits never would have accrued.

Cowart's discussion and interpretation of the statutory phrase "person entitled to compensation" at the time of a third-party settlement, is outcome-determinative, rather than factually distinguishable. This Court observed that "both in legal and general usage, the normal meaning of entitlement includes a right or benefit for which a person qualifies", and it means only that "the person satisfies the prerequisites attached to the right". *Cowart v. Nicklos Drilling Co.*, *supra*, at 2595. *Cowart's* LHWCA disability claim vested at the time of his traumatic work-related injury, and he became a "person entitled to compensation" at the time of his injury. At the time of the pre-death settlements, it was Mr. Yates with his disability claim, and not Mrs. Yates, who was the "person entitled to compensation" within the meaning of § 33(g)(1). Simply put, the Fifth Circuit correctly decided that Maggie Yates did not meet the prerequisites for entitlement to death benefits at the time of the pre-death settlements, and she was not a "person entitled to compensation" at that time.

The Petitioners argue that the Fifth Circuit's *Yates* decision is in direct conflict with the Ninth Circuit's *Cretan* decision, and "consequently, because of this split among the circuits, there are special and important reasons" to grant the writ. (Pet. Cert. 10). *Cretan v. Bethlehem Steel Corp.*, 1 F.3d 843 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2705 (1994). The Respondent agrees that *Yates* conflicts with *Cretan*. *Cretan* dismisses this Court's interpretation in *Cowart* of the phrase "person entitled to

compensation", but *Cretan* does concede that *Cowart's* language "appears to support" the argument that a "potential" widow who enters into pre-death settlements has no vested claim and is not a "person entitled to compensation." (Pet. App. 97). Instead, *Cretan* dismisses *Cowart* and the plain language of § 33(g) on grounds of a "policy of employer protection that is evident on the face of Sections 33(f) and (g)" and a policy against "double recovery." *Cretan, supra*, at 847; (Pet. App. 98-99). No "policy considerations" can override the plain language of *Cowart* or the statute.

Moreover, a writ of certiorari will be granted "only for compelling reasons". Sup. Ct. R. 10. And, a split in two circuits does not control or fully measure the Court's discretion in considering the petition. *Id.* The Fifth Circuit's decision does not conflict with *Cowart*, but merely adheres to it as binding precedent. No important constitutional issue is involved, although the Respondent does not consider the issue of forfeiture under § 33(g) "unimportant". The nature of discretionary review by certiorari is underscored by the number of cases in which certiorari has been denied despite the presence of conflicts between the circuits. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* § 4.4, p. 169 (7th Ed. 1993).

The Petitioners identify a conflict between only two circuits, the Fifth and the Ninth Circuits. The commentators note a perceived policy of the Court not to address conflicts until more than two courts of appeals have considered an issue. *Id.*, at 171; *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 700, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982) (n. 8) (certiorari granted; split of authority between four circuits). The purpose, it is said, is to allow an issue to percolate in the lower courts until a majority rule emerges. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* § 4.4, p. 171 (7th Ed. 1993); Justice Stevens, *Some Thoughts On Judicial Restraint*, 66 *Judicature* 177, 183 (1982).

Because the Fifth Circuit's *Yates* decision was correctly decided in accordance with *Cowart*, and because the petitioner identifies a conflict with only two circuits, the Court's discretion should be exercised to deny the Petition.

II.

DOES THE DIRECTOR OF THE OFFICE OF WORKERS' COMPENSATION PROGRAMS HAVE STANDING TO RESPOND TO A PETITION FOR REVIEW OF A BENEFITS REVIEW BOARD DECISION PURSUANT TO FED. R. APP. P. 15(a)?

In the context of this case, the issue of whether the Director has standing to respond to a Petition for Review does not have sufficient importance to justify granting the writ. The Fifth Circuit's discussion of the issue merited only a footnote in the lower court's opinion. *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 463 (n. 2); (Pet. App. 6). The Fifth Circuit correctly decided the issue. The Director did not petition the BRB for review. In accordance with Fed. R. App. P. 15(a), the Fifth Circuit found that the plain dictate of the rule applies to a proceeding under 33 U.S.C. § 921(c). *Ingalls Shipbuilding Div., Litton Systems, Inc. v. White*, 681 F.2d 275, 281-84 (5th Cir. 1982), *overruled on other grounds, Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406-07 (5th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 818 (1984).

III.

DOES § 33(f) OF THE LHWCA PERMIT THE EMPLOYER AND CARRIER TO OFFSET THEIR LIABILITY FOR DEATH BENEFITS TO A WIDOW WITH THIRD PARTY TORT RECOVERIES OF HER ADULT NON-DEPENDENT CHILDREN WHO DID NOT FILE LHWCA DEATH CLAIMS, HAD NO LEGAL STANDING TO INVOKE THE LHWCA, AND ARE NOT "PERSONS ENTITLED TO COMPENSATION"?

The Petition should be denied on the § 33(f) offset issue because the Fifth Circuit correctly decided the issue on principled grounds found in the statute itself, and because the Petitioner has not identified any conflicts on this issue in the courts of appeals.

The Petitioners stipulated that none of the six (6) Yates' children were dependent on Mr. Yates at the time of his injury and death. *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 462; (Pet. App. 3, 60; Tr. 37). None of the six (6) adult children of Mr. and Mrs. Yates were joined in Mrs. Yates's claim for death benefits under the LHWCA. *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 462 (n. 1); (Pet. App. 3, 63). And, because § 9 of the LHWCA requires dependency, none of the adult children could have invoked the machinery of the Act to assert a claim for death benefits.

The ALJ found that wrongful death damages under Mississippi law were required to be equally distributed to the wife and children. (R. 261; Pet. App. 37-38, 83). This legal principle is in accord with Mississippi law. Miss. Code Ann. § 11-7-13 (1995 Supp.). Mrs. Yates testified that all post-death settlements had been split equally between her and the adult six

(6) children. (Tr. 26-28; Resp. App. 25a). The Fifth Circuit held that an "employer's offset rights are limited to the portion of the recovery intended for the employee" under § 33(f), quoting, *Brown v. Forest Oil Corp.*, 29 F.3d 966, 972 (5th Cir. 1994). *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 465; (Pet. App. 13, 82-83). Although the Petitioners complain of "double recovery" by Mrs. Yates, there was clearly no double recovery since by operation of Mississippi law, the Claimant was entitled to only one-seventh (1/7) of the post-death settlements, and in fact received only that portion. *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 462; (Pet. App. 4, 37-38, 82-83).

The Petitioners' strained interpretation of § 33(f) was rejected by the Fifth Circuit, by focusing on the plain language of the statute, which refers to the "net amount recovered against such third party" . . . "by such person." (emphasis added). Clearly, the words, "by such person", refer to the "person entitled to compensation", words used in the first line of the statute. 33 U.S.C. § 933(f). In short, an employer is entitled to credit only for the net recovery from the third party made by the "person entitled to compensation." *Cowart* says precisely that. *Cowart v. Nickols Drillings, Co., supra*, at 2596 ("§ 33(f) . . . mandates that an employer's liability be reduced by the net amount a person entitled to compensation recovers from the third party").

The Petitioners do not identify any conflicts between the circuits. In fact, *Force v. Director, OWCP*, 938 F.2d 981, 985 (9th Cir. 1991), a case cited by the Petitioners, agrees with the Fifth Circuit's treatment of the issue. (Pet. App. 12). Apportionment of the post-death settlements is also supported by *I.T.O. Corp. v. Sellman*, 967 F.2d 971, 972-73 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993). (offset rights are limited to portion intended for claimant, the "person entitled to compensation").

This issue clearly was decided correctly. Coupled with the

lack of any clear conflict in the circuits, there is no firm basis for granting the discretionary writ of certiorari.

IV.

DO THE RELEASE DOCUMENTS EXECUTED BY THE CLAIMANT-WIDOW AND HER ADULT, NON-DEPENDENT SIX CHILDREN IN CONNECTION WITH POST-DEATH SETTLEMENTS CLEARLY AND UNAMBIGUOUSLY REQUIRE THE WIDOW, MRS. YATES, TO GIVE THE EMPLOYER AND CARRIER A CREDIT FOR SUMS RECEIVED BY HER ADULT, NON-DEPENDENT SIX CHILDREN?

The Petitioners assert that the writ should be granted to review the issue of whether the Petitioners are contractually entitled to an offset in connection with the post-death settlements. The ALJ ruled that Mrs. Yates was contractually obligated to give the Employer credit for the entire amount of the post-death settlements, not only the one-seventh (1/7) she received, based on *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987), *cert. denied*, 484 U.S. 976 (1987). (Pet. App. 41, 86). The Board reversed, finding the ALJ's decision contrary to law, distinguishing the *St. John* case, and finding that the Petitioners were not parties to the settlements and were not third party beneficiaries of the releases. In *Wilfred*, the employer was a party to the third-party settlements. Alternatively, assuming the ALJ correctly interpreted the post-death settlement documents as entitling the employer to a credit for the entire net proceeds of the settlements, the Board found this interpretation of the settlement documents was precluded by § 15(b) of the Act. (Pet. App. 43-44, 51-52).

The Board did more than suggested by the Petitioners. The Petitioners assert only that the Board "found that Ingalls was not

a party to the releases". (Pet. Cert. 23). However, the majority of the Board also found that the language of the settlement documents, including the Raymark documents offered in evidence by the Petitioners, revealed that the intent of the releases was that the employer would receive credit only for the net amount received by Mrs. Yates, the "person entitled in compensation" and the only death claimant under the LHWCA. (Pet. App. 43, 52). The Fifth Circuit did not address the BRB ruling that Ingalls was not a party to the settlement documents, and was not a third party beneficiary. Instead, the Fifth Circuit held that the language of the settlement documents did not clearly and unambiguously require Mrs. Yates to give Ingalls a credit for any sums that exceeded the net amount she received from the post-death settlements. *Ingalls Shipbuilding, Inc. v. Director, OWCP, supra*, at 466; (Pet. App. 14).

The Petition should be denied for several reasons. First, the Fifth Circuit correctly decided the legal issue. The Petitioners assert that the Fifth Circuit "erroneously substituted its interpretation of the language of the releases for that of the Administrative Law Judge", and "re-weighed the evidence." (Pet. Cert. 23-24). The Raymark settlement provides in part that:

... If any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier . . . ordered to pay such compensation benefits shall first be given credit for the consideration paid to the undersigned under this agreement, less reasonable costs of collection, and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted.

(Resp. App. 3a-4a) (emphasis added). The Fifth Circuit found that language almost identical to that quoted in the Raymark release was "included in the other two instruments." (Pet. App. 16).

In short, notwithstanding that the Petitioners and Mrs. Yates have different views of the settlement documents, the critical operative paragraph reflected an intent to give the Employer a credit to the extent that any compensation payments constituted "a lien against the consideration paid herein." (Pet. App. 14, 15). "Obviously, the only portion of the third party settlement which could be subject to a lien are for sums paid to a person 'entitled to compensation'." *Id.* In other words, reasonably interpreted, if "any such claim" (a workers' compensation claim) was filed and was successful, and if the compensation ordered to be paid *found* to be a lien, then the employer was to be given credit for the compensation benefits to any releasor. (Pet. App. 15) (emphasis added).

There had to be a further finding that the compensation ordered to be paid was a lien against the net proceeds paid to Mrs. Yates and her adult children, a contingency precluded by § 33(f) and, in any event, to be determined by a final adjudication under the LHWCA. If, as the Petitioners assert, this issue is characterized as a fact-finder's interpretation, a petition for a writ of certiorari is rarely granted when the asserted error involves factual findings. Sup. Ct. R. 10. The primary responsibility in the federal system of assessing the record to determine whether agency findings are supported by substantial evidence lies with the court of appeals, not the Supreme Court. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310, 94 S.Ct. 2328, 41 L.Ed.2d 72 (1974) (Supreme Court will intervene only in "rare instances where the standard appears to have been misapprehended or grossly misapplied"). To grant the writ on this issue would convert the Court into a tribunal of errors and appeals, beyond its proper function in the federal system.

Second, the post-death settlements were consummated in connection with a Mississippi diversity action, and the three releases provided that they were governed by Mississippi law. (Pet. App. 38, n. 13; Resp. App. 6a, 11a, 16a). The legal interpretation of the contractual language necessarily was based on Mississippi law, as was the apportionment of the post-death settlements under the Mississippi wrongful death statute. (Pet. App. 43, 51-52, 83). The concurring judge of the Board noted that the Employer was not a party to the releases, and the intent of the parties to the releases had to be determined by the terms of the contract as a whole in light of the circumstances under which the contracts were made, citing a legal encyclopedia, 17A Am. Jur. 2d *Contracts* § 440-41. (Pet. App. 51-52).

There is no compelling reason to issue the writ on a matter of contract interpretation, especially when state law applies by the terms of the settlement documents themselves and the Employer was not a party to the contracts. The Petitioners assert that the Fifth Circuit overlooked the district court's order in connection with the Wellington settlement, which purports to address credits. However, the district court could not alter the terms of the release. And, jurisdiction to adjudicate LHWCA credits under § 33(f) lies elsewhere, under the adjudicatory process of the LHWCA.

The Petitioners assert that Ingalls approved the post-death settlements based on Mrs. Yates' representations in the LS-33 forms. (Pet. Cert. 5). However there is nothing in the record which reflects that estoppel was raised at the formal hearing before the ALJ. (R. 260-63). This issue cannot be raised for the first time on appeal. *Moore v. Paycor, Inc.*, 11 B.R.B.S. 483 (1979); *Dueringer v. Gen. Amer. Life Ins. Co.*, 842 F.2d 127, 130 (5th Cir. 1988) (ERISA preemption defense waived if not timely raised). The application of estoppel depends on factual findings, which are not found in this record. Accordingly, it cannot be

raised in this appeal. *Nat. Companies Health P. v. St. Joseph's Hosp.*, 929 F.2d 1558, 1572-74 (11th Cir. 1991).

Third, the writ should not be granted because the decision below is correct on other independent grounds, not reached by the Fifth Circuit. The Employer was not a signatory to the releases, and could not be considered a third party beneficiary of the settlement documents under state law. The intent of the releases was to protect the third party tort defendants. The releases were not for the benefit of the Employer, other than incidentally. (Pet. App. 43, 51). A mere incidental beneficiary acquires no right against the promisor or promisee. The provision of the contract in issue must have been placed in the contract for the direct benefit of the third party beneficiary. *Miss. High School Activities Assoc., Inc. v. Farris*, 501 So. 2d 393, 396 (Miss. 1987). As a mere incidental beneficiary, the employer acquired no rights against the parties to the contract. *Gerard J. W. Bros. & Co., Inc. v. Harkins & Co.*, 883 F.2d 379, 382 (5th Cir. 1989).

Moreover, the Board found that acceptance of the Employer's version of the releases would work a waiver of Mrs. Yates's compensation in violation of § 15(b) of the Act, 33 U.S.C. § 915(b). (Pet. App. 44, 52). Sections 15(b) and 16 of the LHWCA invalidate a release of compensation by a claimant without approval under § 8(i) of the Act. *Oceanic Butler, Inc. v. Nordahl, supra*, at 777 (n. 3). A decision on the issue is unnecessary, since the decision below is correct on other grounds. *Belcher v. Stengel*, 429 U.S. 118, 119, 97 S. Ct. 514, 50 L. Ed. 2d 269 (1976).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WYNNE E. CLARK
Counsel of Record
 OWEN, GALLOWAY & CLARK
 Attorneys at Law
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APPENDIX A — ABSOLUTE RELEASE - RAYMARK RELEASE

ABSOLUTE RELEASE

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, *Maggie J. Yates, Darlene Y. Foster, Peggy W. Moore, Maudean Y. Peacock, Phillip G. Yates, Roger L. Yates & Robert W. Yates*, Spouse and heirs of *Jefferson T. Yates*, deceased, Social Security Number 416-16-5370 (hereinafter collectively referred to as "Releasors"), for and in consideration of the total sum of \$2,821.00, cash in hand paid, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, do hereby fully, completely and finally remise, release, acquit, discharge, indemnify and hold harmless Raymark Industries, Inc., its insurers, owners, predecessors, successors, designees, representatives, assigns, principals, agents, servants, employees, employers, divisions, stockholders, directors, officers, parent corporation, subsidiary corporations (hereinafter collectively referred to as "Releasees"), of and from any and all claims, demands, actions, causes of action, suits and damages of every kind and nature whatsoever, including, but not limited to, any and all rights of recovery under Miss. Code Ann. § 11-7-13 (Supp. 1982) and any and all claims for strict liability, negligence, conspiracy and/or breach of warranty, which Releasors may have or claim to have, for actual or punitive damages, costs, loss and expense of every kind or nature whatsoever, whether known or unknown, anticipated or unanticipated, and whether accrued or hereafter to accrue, including, without limitation, any claim for cancer, mesothelioma or any other condition or disease and the risk thereof, caused by, resulting from, growing out of or in any manner connected with the alleged exposure of *Jefferson T. Yates*, deceased, to asbestos or asbestos-containing products mined, manufactured, sold, supplied, distributed or rebranded

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by Releasees and said consideration is hereby acknowledged to be paid, received and performed in full and complete compromise, settlement, accord and satisfaction therefor, all as is hereinafter described with particularity. It is expressly understood and agreed that this Release shall not affect any claim, cause of action or right that Releasors may have against Releasees based upon their individual exposure to asbestos and resulting asbestos-related disease. Such claim, cause of action or right is expressly reserved.

Releasors also agree and stipulate that they will dismiss with prejudice Raymark Industries, Inc. from the civil action now pending in the U.S. District Court Southern District of Miss., styled, *Jefferson T. Yates vs Raymark Industries, Inc.*, Civil Action No. 581-0243(G) but with the understanding that Releasors reserve their right to proceed against all other Defendants named therein, and Releasors covenant and agree to forever refrain and desist from instituting, prosecuting or asserting against Releasees any claim, demand, action or suit hereby released.

Releasors further agree, covenant and warrant that there have been no assignments of any rights or claims hereby released to any person or persons not joining in this Release; and Releasors will defend, hold harmless and indemnify Releasees to the extent of the consideration paid hereby as to any and all such claims of assignment, and agree, stipulate and warrant that, hereafter, Releasees are and shall be forever free of liability and will be as free of liability in the premises as if the aforesaid rights or claims had never existed.

Releasors understand that Releasees deny any and all liability in the premises, and Releasors represent and warrant

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that they have no other presently existing claims as against Releasees which were not included in the aforesaid civil action, and that this Release and the dismissal of the aforesaid civil action with prejudice extinguishes each and every right and claim which Releasors have, have ever had or may ever have in the premises, as against Releasees which may have arisen from the alleged exposure of *Jefferson T. Yates*, deceased, to asbestos or asbestos-containing products mined, manufactured, sold, supplied or rebranded by Releasees.

Releasors represent, covenant and warrant that they are the sole and only natural and legal heirs at law of *Jefferson T. Yates*, deceased, and are the only persons entitled to bring an action pursuant to Miss. Code Ann. § 11-7-13 (Supp. 1982) for the death of *Jefferson T. Yates*, deceased.

It is understood and agreed by Releasors that the payment and receipt of the aforesaid consideration is not to be construed as an admission of any liability whatsoever by Releasees and that Releasees specifically deny any such liability to Releasors, and that if *Jefferson T. Yates*, deceased, was exposed to any asbestos-containing products mined, manufactured, sold, supplied or distributed by Releasees, such exposure was minimal and that it is extremely doubtful that there was any such exposure or that any such exposure caused or contributed to any injuries to *Jefferson T. Yates*, deceased.

Releasors do hereby represent and warrant to Releasees that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including but not being limited to the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be

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successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to any Releasor shall first be given credit for the consideration paid to Releasors under this agreement, less reasonable cost of collection, and shall make no payment of any compensation benefits to any Releasor until the consideration paid to Releasors under this agreement is exhausted. It is further agreed, in the alternative, that should this agreement be found invalid or should any such employer or compensation carrier making such compensation benefits payments refuse to abide by this agreement, and file or demand payment by Releasees, then and in that event, and as an alternative to the above agreement, Releasors agree to indemnify and hold harmless Releasees to the full amount of the consideration paid to Releasors under this agreement arising out of such claim for subrogation or indemnity by such employer and/or such employer's insurance carrier.

It is the specific intent and purpose of Releasors to execute this Release only as to Releasees, and it is understood and agreed by the parties hereto that this Release is not intended to nor does it release any other person, firm, corporation, or any other entity or party who or which may be responsible in whole or in part for any injuries, diseases, and illnesses, or other damages sustained by the deceased, and/or Releasors as a result of the alleged exposure of *Jefferson T. Yates*, deceased, to asbestos or any asbestos-containing product. It is the specific intent of the parties to this agreement and they do hereby reserve unto Releasors, all claims and causes of action, whether past, present or future, against all other persons, firms, corporations, parties or other entities, including, but not limited to, those claims included in the aforesaid civil action.

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In executing and delivering this release, Releasors rely wholly upon their own judgment, knowledge and belief as to the nature, extent and duration of the injuries and damage which they may have suffered or sustained, or may sustain in the future, as the result of the events, incidents or occurrences hereinabove specified, and, as to the questions of liability involved, Releasors have had the benefit of legal counsel of their own choosing, said counsel having indicated his approval of this settlement and the execution and delivery of this Release by the affixing of his signature hereto, and Releasors further represent and warrant that they have not been influenced by any representations, statements, or warranties made by any person, firm, partnership, association, organization or corporation hereby released, or by any agent, or other person representing Releasees, concerning the nature or extent of their injuries or damages, or losses, or the legal liability therefor.

Releasors, individually and jointly, certify that they are of legal age, under no disability of any kind, and fully and completely competent to execute this Release in their own behalf. Releasors agree and covenant that any defect in this Release which may exist as a result of the incompetency of Releasors or any statutory beneficiary of *Jefferson T. Yates*, deceased, is waived.

In the event that the estate of *Jefferson T. Yates* deceased, remains open at the time of the execution of this Release, then Releasors covenant and agree that they have been duly and properly authorized by a court of competent jurisdiction to execute this Release and to accept the aforesaid consideration in full and complete satisfaction for all claims they have or may ever have or which the estate of the deceased has or may ever have as against Releasees. In the alternative, Releasors certify

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and warrant that *Jefferson T. Yates*, deceased, died intestate, and no estate has been opened and no administrator of an estate has been appointed.

Should it develop that there are any mistakes in this instrument, whether mutual or unilateral, which cause the release of Releasees to be defective or less than complete, Releasors will execute any and all instruments and do any and all things necessary to effectuate a full, final and complete release.

It is understood and agreed that the terms and conditions of this Release shall remain confidential, and shall not be disclosed to any person who is not a party to this Release.

It is further understood and agreed that the terms of this Release shall be construed and governed by Mississippi law.

WITNESS our signatures, this the ____ day of ____, 1987.

s/ Maggie J. Yates

s/ Darlene Y. Foster

s/ Peggy W. Moore

s/ Maudean Y. Peacock
POA Maggie Yates

s/ Phillip G. Yates

s/ Roger L. Yates

s/ Robert W. Yates

APPENDIX B — ACKNOWLEDGEMENT

I, *Maggie J. Yates, Widow of Jefferson T. Yates, Dec.* do hereby acknowledge and accept this settlement my attorney has negotiated with the Defendant, *Raymark Industries, Inc.* I fully understand that in the event I am successful in my Workmen's Compensation Claim now pending against Litton Systems, Inc. That Litton Systems, Inc. will be given credit for the amount of money paid to me by the above named Defendant, and that Litton Systems, Inc. will owe me no Workmen's Compensation benefits or medical benefits under the Longshoremen and Harborworker's Compensation Act until the amount received by me from the above mentioned Defendant has been exhausted based on the weekly benefits due me from Litton Systems, Inc. under the aforementioned act or based on medical expenses I incur as a result of my industrial injury associated with my exposure to asbestos. I fully understand that I can only be compensated for my injury one time and that my employer or former employer, Litton Systems, Inc. is either entitled to a credit for the amount of any settlements I enter into with Third Party Defendants; or Litton Systems, Inc. is entitled to be subrogated* against any settlement I might make for benefits which have been paid to me under the above mentioned act, and I accept this settlement with full knowledge of these facts and after having been fully advised by my attorney of the foregoing circumstances and situation.

WITNESS my signature this the 27th day of April, 1988.

s/ Maggie J. Yates
Maggie J. Yates, Widow of
Jefferson T. Yates, Dec.

* In this situation the word "subrogated" means that Litton Systems, Inc. will have to be paid back any money it has paid under LHWCA.

**APPENDIX C — PARTIAL RELEASE -
WELLINGTON RELEASE**

PARTIAL RELEASE

FOR AND IN CONSIDERATION of the sum of Sixty Thousand and No/100 Dollars (\$60,000.00), cash in hand this day paid, the undersigned, Maggie J. Yates, Social Security No. 416-30-5633, individually, and as Personal Representative of the Estate of Jefferson T. Yates, deceased, and Darlene Foster, Peggy Moore, Maudean Peacock, Phillip Yates, Roger Yates and Robert Yates, adult children of Jefferson T. Yates, deceased, for themselves, their heirs, administrators, executors, personal representatives, and assigns (said parties hereinafter collectively referred to as "the undersigned" or "Releasors"), do hereby release and forever discharge ACandS, Inc.; Zurich American Insurance Companies; Aetna Life & Casualty Co; U.S. Gypsum; Amchem Products, Inc. (succeeded in interest by Union Carbide Agricultural Products, Inc.); Union Carbide; American Universal Insurance Group; Unijax; A. P. Green Refractories Company; Armstrong World Industries, Inc; T & N plc formerly known as Turner & Newall PLC; Bituminous Casualty Corp.; Thorpe Insulations; Carey Canada, Inc.; Shook & Fletcher; Royal Insurance Co.; CertainTeed Corp.; Rock Wool Manufacturing Co.; C. E. Thurston & Sons, Inc.; Reliance Insurance Co.; CIGNA Property and Casualty Insurance Cos.; Quigley; Continental Corp.; Pittsburgh Corning Corp.; Crum & Forster; Pfizer; Dana Corp.; Owens-Illinois, Inc.; Eagle-Pitcher Industries, Inc.; Owens-Corning Fiberglas Corporation; Employers Insurance of Wasau; Nuturn Corp.; Fiberboard Corp.; Nuclear & Environmental Protection, Inc.; Fireman's Fund, Inc.; North Brothers; First State Insurance Company; Nosroc Corp.; I.U. North America, Inc.; National Service Industries, Inc.; Flexitallic Gasket Company, Inc.; National Gypsum Co.; The Flintkote Co.; Maremont Corp.; Genstar

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Corp.; Lloyd's of London; Harbor Insurance Co.; Hartford Insurance Group; Liberty Mutual Insurance Co.; H. K. Porter Company, Inc.; The Keene Corp.; GAF Corporation; Hopeman Brothers, Inc.; Porter Hayden Company; and The Celotex Corporation, including, but not limited to, The Philip Carey Manufacturing Company (incorporated in 1888), The Philip Carey Manufacturing Company (incorporated in 1966), Philip Carey Corporation, Briggs Manufacturing Company, Panacon Corporation; their present and former parent corporations, subsidiary corporations, successor corporations, predecessor corporations, affiliated corporations, and each of the aforesaid or above-described corporation's or company's present and former successors, predecessors, and assigns, insurers, reinsurers, and their present and former directors, officers, agents, servants, employees, and stockholders of all such corporations or companies, and any and all other persons, firms, partnerships, associations or corporations who are or may be in any manner whatsoever liable for their acts, or for the acts of any of them (said parties hereinafter collectively referred to as "Releasees"), jointly

* * *

Mississippi against all other persons, firms corporations, parties, or other entities, other than the Releasees herein.

The undersigned do further agree that for the aforesaid consideration, Releasees will be dismissed with prejudice from Civil Action No. S81-0243(G) now pending in the United States District Court for the Southern District of Mississippi, but with the understanding also that the undersigned reserve their right to proceed against all other defendants named therein.

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The undersigned do hereby represent and warrant to Releasees that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including, but not being limited to, the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to either of the undersigned shall first be given credit for the consideration paid to the undersigned under this agreement, less reasonable cost of collection, and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted. It is further agreed in the alternative, that should this agreement to be found invalid or should any such employer or compensation carrier making such compensation benefits payments refuse to abide by this agreement, and file or demand payment by Releasees, then and in that event, and as an alternative to the above agreement, the undersigned agree to indemnify and hold harmless Releasees to the full amount of the consideration paid to the undersigned under this agreement arising out of such claim for subrogation or indemnity by such employer and/or such employer's insurance carrier.

The undersigned, Maggie J. Yates, Phillip Yates, Roger Yates, Robert Yates, Darlene Foster, Peggy Moore and Maudean Peacock, certify that they are of legal age, with no mental disability of any kind, and are fully and completely competent to execute this release each in his or her own behalf and in the capacities shown. It is understood and agreed that this instrument contains the entire agreement between the parties and the undersigned in executing the same agree that no promise,

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inducement, or agreement not expressed herein has been made to the undersigned, and that in executing the same they are relying upon their own judgement as to the full extent and nature and the duration of any injuries, illnesses, and damages of Jefferson T. Yates, and any damages sustained by the undersigned. The undersigned declare that the terms of this agreement have been read, voluntarily accepted and agreed to and approved by their attorney of record.

This release shall be governed and construed by the laws of the State of Mississippi.

WITNESS OUR SIGNATURES, this the 5th day of April, 1989.

s/ Maggie J. Yates
MAGGIE J. YATES, Individually and as
Personal Representative of the Estate of
JEFFERSON T. YATES, Deceased

s/ Phillip Yates, P.O.A. Maggie J. Yates
PHILLIP YATES, Adult Son of
JEFFERSON T. YATES, Deceased

s/ Roger Yates
ROGER YATES, Adult Son of
JEFFERSON T. YATES, Deceased

s/ Robert Yates
ROBERT YATES, Adult Son of
JEFFERSON T. YATES, Deceased

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s/ Darlene Foster
 DARLENE FOSTER, Adult Daughter of
 JEFFERSON T. YATES, Deceased

s/ Peggy J. Moore 3/10/89
 PEGGY MOORE, Adult Daughter of
 JEFFERSON T. YATES, Deceased

s/ Maudean Peacock 3/30/89
 MAUDEAN PEACOCK, Adult
 Daughter of JEFFERSON T. YATES,
 Deceased

EXECUTED IN MY PRESENCE
 AND APPROVED BY ME:

s/ Ransom P. Jones, III
 RANSOM P. JONES, III
 Attorney for Releasors

**APPENDIX D — PARTIAL RELEASE - PRO TANTO
 RELEASE COVENANT NOT TO SUE -
 MANVILLE RELEASE**

[PARTIAL RELEASE/PRO TANTO RELEASE/
 COVENANT NOT TO SUE]

FOR AND IN CONSIDERATION of the sum of *Forty-three Thousand and No/100 Dollars (\$43,000.00)*, cash in hand this day paid, the undersigned, *Maggie J. Yates*, Social Security No. *416-30-5633*, individually, and as personal representative of the Estate of *Jefferson T. Yates* deceased, and *Maudean Y. Peacock*, *Phillip G. Yates*, *Roger L. Yates*, *Peggy Moore*, *Robert Wayne Yates*, *Darlene Y. Foster*, adult children of the deceased, for themselves, their heirs, administrators, executors, personal representatives, and assigns (said parties hereinafter collectively referred to as "the undersigned") do hereby [partially release/pro tanto release/covenant not to sue] and forever discharge the MANVILLE PERSONAL INJURY SETTLEMENT TRUST, THE MANVILLE CORPORATION (hereinafter "Manville"), their past, present, or future trustors, trustees, directors, officers, agents, servants, employees, attorneys, successors in interest, predecessors in interest, parents, subsidiaries, both insurers and all Settling Insurance Companies (as defined in the Second Amended Plan of Reorganization, p. M-155) (both only to the extent of their liability as insurers to Manville, but not in their individual capacities or otherwise) and assigns, and their agents, servants, employees, heirs, executors and administrators, their successors and assigns (hereinafter collectively referred to, and considered as "the TRUST") from any and all liability arising out of, attributed to, or connected with exposure of the deceased to asbestos, and/or products or things containing asbestos, made, milled, manufactured, mined, fabricated, distributed, sold or otherwise connected with the TRUST from any and all claims,

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demands, damages, actions, causes of action, suits in equity, rights, costs, loss of services or consortium, expenses and compensation whatsoever, under any present and/or future theory of law, in contract tort or otherwise, from any and all damages and injuries known and unknown, anticipated and unanticipated, foreseen and unforeseen, past, present and future, including but not limited to claims that the undersigned may now or hereafter have as a result of the decedent's death for medical expenses, pain and suffering of decedent prior to his death, loss of consortium, companionship, services, and society, the value of life or decedent and any and all other claims for damages of whatsoever.

It is also expressly understood and agreed that this release shall not affect any claim, cause or action, or rights that the undersigned may have against the TRUST based upon their individual exposure to asbestos and resulting asbestos-related disease.

* * *

agreement and they do hereby reserve unto the undersigned, their heirs, administrators, executors, dependents and assigns, all claims, actions, and causes of action, whether past, present, or in the future, including, but not limited to, those claims included in Civil Action No. S81-0243(G) now pending in the United States District Court for the Southern District of Mississippi against all other persons, firms, corporations, parties, or other entities, other than the TRUST herein.

The undersigned do further agree that for the aforesaid consideration, the TRUST will be dismissed with prejudice from Civil Action No. S81-0243(G), now pending in the United States

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District Court for the Southern District of Mississippi, but with the understanding also that the undersigned reserve their right to proceed against all other defendants named therein.

The undersigned do hereby represent and warrant to the TRUST that whether there is now pending any claim for worker's compensation benefits under any state or federal law or statute, including, but not being limited to, the Mississippi Workers' Compensation Act or the Federal Longshoremen's and Harbor Workers' Act, or if any such claim shall hereafter be filed and be successful, and the amounts ordered to be paid are found to be a lien against the consideration paid herein, then any employer or its insurance carrier paying or ordered to pay such compensation benefits to either of the undersigned shall first be given credit for the consideration paid to the undersigned under this agreement, less reasonable cost of collection and shall make no payment of any compensation benefits to the undersigned until the consideration paid to the undersigned under this agreement is exhausted.

It is understood that the TRUST is required to report to the Bankruptcy Court and may be required by law or the TRUST'S fiduciary duties to beneficiaries to report that it has settled with the undersigned and the amount of the settlement.

The undersigned certify that they are of legal age, with no mental disability of any kind, and are fully and completely competent to execute this release each in his or her own behalf. It is understood and agreed that this instrument contains the entire agreement between the parties and the undersigned in executing the same agree that no promise, inducement, or agreement not expressed herein has been made to the undersigned, and that in executing the same they are relying

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upon their own judgment as to the full extent and nature and the duration of any injuries, illnesses, and damages of the undersigned. The undersigned declare that the terms of this agreement have been read, voluntarily accepted and agreed to and approved by their attorney of record.

This release shall be governed and construed by the laws of the State of Mississippi.

WITNESS OUR SIGNATURES, this the 3 day of March 1989.

s/ Maggie J. Yates
Maggie J. Yates

s/ Maudean Y. Peacock
Maudean Y. Peacock

s/ Phillip G. Yates by Maggie J. Yates
Phillip G. Yates

s/ Roger L. Yates
Roger L. Yates

s/ Robert Wayne Yates
Robert Wayne Yates

s/ Peggy Moore
Peggy Moore

s/ Darlene Y. Foster
Darlene Y. Foster

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APPROVED:

s/ Ranson P. Jones
Ranson P. Jones
Attorney for Plaintiffs

APPENDIX E — TRANSCRIPT OF PROCEEDINGS
PAGES 22-28

[22] JUDGE McCOLGIN: Off the record.

(Discussion held off the record.)

JUDGE McCOLGIN: On the record.

Whereupon,

MAGGIE YATES

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

JUDGE McCOLGIN: May I ask you your full name, please?

THE WITNESS: Maggie Yates.

JUDGE McCOLGIN: Thank you. Proceed, counsel.

DIRECT EXAMINATION

BY MR. WILSON:

Q Ms. Yates, where do you live?

A Lucedale on Route 8, Box 249.

Q That is Jackson County, Mississippi?

A No, sir, that is George County.

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Q George County, Mississippi?

A Yes.

Q How long have you lived there?

A Well, 30 something years. I couldn't tell you exact.

Q I believe that you were married to Mr. Jefferson Yates, Is that correct?

A Yes, sir. 1931.

[23] Q August 29, 1931? Is that correct?

A No, sir, September 3, 1931.

Q Were you divorced from him?

A No, sir.

Q Mr. Yates I believe passed away January 28, 1986. Is that correct?

A that's right.

Q You were married to him at that time?

A Yes, sir.

Q Did you and Mr. Yates have any children/

A Yes, sir, we did.

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Q How many children did you have?

A Six, three girls and three boys.

Q Ms. Yates, I think you have a birthday coming up in August, do you not?

A Yes, sir, the 29th.

Q You will be 83 years of age, I believe?

A That's right.

Q Ms. Yates, do you recall that your husband had filed a claim for asbestos disease against the various manufacturers of asbestos material?

A Yes, sir.

Q And that was filed in the Southern District of Mississippi, I believe, was it not?

A Yes, sir, as far as my knowledge it was.

[24] Q Do you recall when that lawsuit was filed?

A No, sir, I sure don't. I don't remember that.

Q If I told you 1981 would that ring a bell with you?

A That seems like that might be it. I wouldn't say for sure because I don't really know.

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Q After your husband filed a claim do you recall coming to our office and receiving some settlements from different companies?

A Yes, sir.

Q Do you recall that in May of 1981 that you got a settlement from Combustion Engineering in the amount of \$11,500 gross amount with \$300 going to you and Mr. Yates?

A Yes, sir.

Q And in I believe May of 1982 you and Mr. Yates received two settlements, and those were one from Garlock in the gross amount of \$300 with \$180 to you and Mr. Yates and Rockwool which was a gross settlement of \$1,200 for a net to you and Mr. Yates of \$720. Does that ring a bell with you?

A Yes, sir, that seems right.

Q Then in March of 1982 with Armstrong Cork you had a settlement of \$500 with a net to you and Mr. Yates of \$300?

A Yes, sir.

Q And in March of 1983 with H.K. Porter, one of the [25] asbestos manufacturing companies? The amount of the settlement was \$7,250 with a net to you and Mr. Yates of \$4,350. Do you remember that?

A Yes, sir.

Q Then in 1984 you and Mr. Yates, and this was still at a time when he was alive, correct?

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A That's right.

Q In January of 1984 there was a settlement with G.A.F. Corporation in the gross amount of \$6,000 with a net to you and Mr. Yates of \$3,600. Is that correct? Do you recall that?

A As far as my knowledge it is.

Q Do you recall prior to that time that Mr. Yates would have settled his claim against Ingalls for a lump sum amount? Do you recall that?

A I don't remember.

Q Do you recall whether or not that settlement of \$3,600 from G.A.F. went to you and Mr. Yates, or did it go back to Ingalls?

A Well, look. I am going to tell you know just in my words like I did. They sent us a check of what they call compensation I guess. We turned it back. You know, we didn't pay it all back at one time, but we did pay it all back. Mr. Jones knows that, If that is what you are talking about.

[26] Q In January of that same year there was a settlement with Owens Corning Fiberglass in the amount of \$14,300, of which the clients' portion would have been \$8,580. Do you recall that?

A Yes, I guess so. As far as I know. I tell you, I have had to much up to now that I really don't remember every one of them.

Q And on January 31, 1984, \$3,000 gross amount from Owens Illinois. The client portion was \$1,775. Is that correct?

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A Yes.

Q Mr. Yates died in January of 1986. Is that correct?

A Yes, sir.

Q January 28 to be exact?

A That's right.

Q After Mr. Yates' death do you recall getting some settlements in from some of the asbestos companies?

A Well, as far as my knowledge we got one check. The first one was _ was it \$70?

Q Let me ask you: In May of 1988 do you remember getting a check from a settlement with Raymark Corporation in the amount of \$1,880.67, of which your portion was \$79.07?

A That is what I am talking about. That's it.

[27] Q A portion of that, some \$1,327.21, was returned to Ingalls as a lien?

A Yes, it was. That's right.

Q And the balance of that was divided between you and your six children? Is that correct?

A Yes. Right.

Q In April of 1989, some three years after your husband's

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death, there was a settlement with the Wellington Group in the gross amount of \$60,000, and out of that you received a check for \$5,142.86?

A That's right.

Q And each of your children got that amount also? Is that correct?

A The same. They got the same.

Q Out of the net \$36,000?

A That's right.

Q Then in June of 1989 there was a settlement with the Johns Manville Corporation in the gross amount of \$43,000 with a net of \$25,800, and you got a check out of that for \$3,685.72 as your portion. Is that correct? That would be on the last page of C-1. That would have been in June of 1989. Do you recall that?

A No. No, sir. We didn't get none in 1989. We sure didn't.

Q This would have been two years ago in May of 1989 [28] with Johns Manville. The gross amount was \$43,000. Regardless of when it was, do you recall settling with Johns Manville Corporation for \$43,000?

A Uh-uh.

Q You did not recall that?

A No.

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Q Other than those I have just gone over with you do you know of any other settlements that you would have gotten that I have not gone over with you?

A No, sir, I sure don't.

Q Since your husband's death in 1986, the settlements that have come in since that time, have those always been split between you and your children?

A Yes, sir.

MR. WILSON; I have no other questions.

CROSS-EXAMINATION

BY MR. HOWELL;

Q Ms. Yates, you and your husband I believe you said married back in the 1930s. Is that correct?

A 1931.

Q And you never divorced or separated from then up until his death?

A No, we sure didn't.

Q And you said you had six children, three girls and three boys. Is that right?

* * *